NO. 48232-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RIGOBERTO PUGA DE LA ROSA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Mark F. McCauley, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

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ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Puga De La Rosa's motion to suppress because the search warrant affidavit does not set forth sufficient facts to support a reasonable nexus between the place to be searched and the items to be seized.

2. If the State substantially prevails on appeal, any request for appellate costs should be denied.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the search warrant affidavit contains sufficient facts to support a reasonable nexus between the place to be searched and the items sought?

2. Whether Mr. Puga De La Rosa should have to pay appellate costs if he does not substantially prevail on appeal and the State requests costs?

STATEMENT OF THE CASE

1. Procedural Facts

The State charged Mr. Puga De La Rosa with unlawful possession of a firearm in the second degree and possession of methamphetamine. CP 1-2.

Pretrial, Mr. Puga De La Rosa moved to suppress the gun and methamphetamine evidence seized as a result of a search warrant on his

home. CP 42-79; RP 10/16/15 at 3-20. The trial court denied the suppression motions. RP 10/21/15 at 3-10.

Mr. Puga De La Rosa, to preserve his right to appeal, agreed to a trial on stipulated facts. CP 81-113; RP 10/23/15 at 21-31. The court granted the State's motion to dismiss the methamphetamine charge and the court found Mr. Puga De La Rosa guilty of unlawful possession of a firearm in the second degree. CP 80; RP 10/23/15 at 30.

Mr. Puga De La Rosa's standard range was 9-12 months. CP 115; RP 11/2/15 at 14. At sentencing, the court imposed 12 months and converted 30 days to community service. CP 116-17; RP 11/2/15 at 14.

There was no discussion at sentencing of Mr. Puga De La Rosa's present and future ability to pay legal financial obligations (LFOs) and no one objected to boiler plate language on the judgment and sentence indicating Mr. Puga De La Rosa had the ability to pay discretionary LFOs. CP 115; RP 11/2/15 at 14-18. The trial court imposed only mandatory LFOs. CP 118.

The court found Mr. Puga De La Rosa indigent for appellate purposes. Supplemental Designation of Clerk's Papers, Order of Indigency (sub. nom. 38).

Mr. Puga De La Rosa appeals all portions of his judgment and sentence. CP 124.

2. Affidavit in support of the search warrant

In the Affidavit for Search Warrant, Detective Jon Hudson details an August 3, 2015, shooting in Aberdeen. Moments after the shooting, the police contacted three young men walking away from the area of the shooting. In varying degrees, they each acknowledged seeing a fight and hearing gunshots but did not know who had done the shooting. CP 26-27. The police suspected each young man of being gang affiliated. CP 26-33. Other citizens in the area during the shooting reported hearing gunshots, two groups of young men – some wearing blue - looking at each other, a car speeding off after the shooting. CP 28-29.

On August 4, the police found Mr. Puga De La Rosa about three blocks away from the location of the shooting. CP 29-30. They believed he was affiliated with the Norteno gang. CP 30. Mr. Puga De La Rosa and his girlfriend, Karli Sansom, complained that Matthew Perron smashed Ms. Sansom's Honda Civic's windshield with a shovel. CP 30. Mr. Perron's girlfriend, Ashley Young, told the police that some woman in a floppy hat used the shovel to break the Honda's window and Mr. Perron had nothing to do with it. Ms. Young also told the police that Mr. Puga De La Rosa shot at her and Mr. Perron the day before. CP 32-33.

After the August 3 shooting, police recovered .380 caliber bullet casings from the street and a bullet consistent with a .380 caliber inside an

unoccupied home proximate to the location of the earlier shooting they had responded to. CP 25.

Although the face of the search warrant affidavit referenced Ms. Sansom's Honda Civic, Mr. Puga De La Rosa's residence at 1700 West Market Street, Aberdeen, and the shed on that property. CP 24, Detective Hudson believed evidence of any crime related to the shooting would be found *only* in Ms. Sansom's Honda Civic:

> [I] I believe that there is probable cause the evidence named on the face of this affidavit will be found in the aforementioned vehicle. I respectfully request a search warrant for the vehicle listed on the face of this affidavit for search warrant.

CP 36-37.

Judge Edwards signed the search warrant on August 5. CP 21-22. Contrary to Detective Hudson's representation in the search warrant affidavit that evidence of any crime would *only* be in the Honda Civic, the search warrant authorized the police to search the Honda Civic, and the residence and shed at 1700 West Market Street, Aberdeen. CP 21-22. The search authorized the police to seize indicia of dominion and control of the residence, firearms and ammunition (especially .380 caliber) and red clothing suggesting gang affiliation. CP 22.

During their search of the home, the police found methamphetamine, drug paraphernalia, and in a bedroom closet, a 9mm pistol and ammunition. CP 38-39.

Defense counsel moved unsuccessfully to suppress evidence found during the search of the residence on the ground that the search warrant was unsupported by probable cause. CP 5-22. Specifically, counsel argued (1) the reliability prong of the *Aguilar-Spinelli*[1] test was unmet as it related to the information provided by informant Ashley Young and (2) the search warrant affidavit specified no nexus with Mr. Puga De La Rosa's West Market Street address. CP 11-15; RP 8/16/16 at 8-16, 19-22. The court found adequate informant reliability. RP 10/21/15 at 3-7. The court also found that because Detective Hudson broadly referenced Mr. Puga De La Rosa's address in the search warrant affidavit and the search warrant, and the authorization included a search for a gun, the search warrant established an adequate nexus with the residence. RP 10/21/15 at 7-10.

[1] *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

ARGUMENT

1. The trial court erred in denying Mr. Puga De La Rosa's motion to suppress because the search warrant affidavit does not set forth sufficient facts to support a reasonable nexus between the place to be searched and the items to be seized.

This court reviews de novo conclusions of law from an order denying the suppression of evidence. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002).

The rights of individuals to be secure from government intrusion into their persons and property are protected by both the United States and Washington Constitutions. U.S. Const. Amend. IV; Wash. Const. Art. 1 § 7. With a few narrowly-tailored and jealously-guarded exceptions, agents of the state or federal government may only search an individual's person or his home with a warrant. U.S. Const. Amend. IV; Wash. Const. art. 1, § 7; *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004).

A search warrant issues only upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An application for a search warrant, the search warrant affidavit, must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. *Thein*, 138 Wn.2d at 140. Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to

establish a reasonable inference that the defendant is probably involved in a criminal activity and that evidence of the crime can be found at the place to be searched. *Id.* Accordingly, probable cause thus requires (1) a nexus between criminal activity and the item to be seized and the (2) nexus between the item to be seized and the place to be searched. *Id.*

When determining whether or not a search warrant should have been issued, trial courts are limited to the "four corners" of the affidavit and the application for the warrant, and may not consider other information or evidence. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

A finding of probable cause must be grounded in fact. *Thein*, 138 Wn.2d at 147; *Cole*, 128 Wn.2d at 286. This requirement is constitutionally prescribed because information that is not sufficiently grounded in fact is inherently unreliable and frustrates the detached and independent evaluative function of the magistrate. *Thein*, 138 Wn.2d at 147. Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. *Thein*, 138 Wn.2d at 147; *see, e.g., State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980) ("if the affidavit or testimony reveals nothing more than a declaration of suspicion and belief, it is legally insufficient"); *State v. Helmka*, 86 Wn.2d

91, 92, 542 P.2d 115 (1975) ("Probable cause cannot be made out by conclusory affidavits"); *State v. Patterson*, 83 Wn.2d 49, 52 515 P.2d 496 (1973) (record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant.)

Moreover, probable cause must be based on more than conclusory predictions. *Thein*, 138 Wn.2d at 147. Blanket inferences of this kind substitute generalities for the required showing of reasonably specific "underlying circumstances" that establish evidence of illegal activity likely to be found in the place to be searched in any particular case. *Id.* at 147-48. Probable cause to believe that a man has committed a crime does not necessarily give rise to probable cause to search his home. *Id.* at 148.

Further, the existence of probable cause is to be evaluated on a case-by-case basis. *Thein*, 138 Wn.2d at 149; *Helmka*, 86 Wn.2d at 93. Thus, the general rules must be applied to specific factual situations. *Thein*, 138 Wn.2d at 149. In each case, the facts stated the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness. *Id.* Generally exploratory searches are unreasonable, unauthorized, and invalid. *Id.*

In *Thein*, police obtained information through a series of investigations and informants that Thein was involved in the production and distribution of marijuana. *Id.* at 136-40.

Police officers applied for a warrant to search Thein's residence, reasoning that in their "training and experience" drug dealers keep evidence in their homes. *Id.* at 138-39. The magistrate issued the warrant, and officers found evidence in Thein's home which was used at trial to convict him over the objections of Thein's counsel. *Id.* at 140. Although upheld by the Court of Appeals, the Supreme Court overturned the conviction and held that the affidavit was insufficient to establish a nexus between Thein's home and evidence of drug dealing. *Id.* at 151.

The Court reasoned that the conclusory "training and experience" type statements of officers applying for the warrant did not set forth any facts which established that it was likely that evidence of drug-dealing would be found at Thein's home. *Id.* at 148. The Court held that such a nexus was not satisfied by the generalized statements regarding the habits of drug dealers and their practice of storing drugs or drug paraphernalia at their homes. *Id.* at 147-48. Apart from such statements, there was no incriminating evidence linking drug activity to the home that was searched in Thein: "The only evidence linked to the Austin Street residence is innocuous: a box of nails and vehicle registration." *Id.* at 150. The Court instead demanded that specific facts be set forth linking the evidence to the location to be searched. *Id.* Generalizations and assumptions that a criminal would keep evidence at his home are grossly insufficient to

establish probable cause without facts making it likely – this despite the fact that it may be common-sense to make such an assumption. *Id.* The Court further reasoned that even if there is no other logical place for a criminal to keep evidence, a nexus with the individual's home cannot be established. *Id.* at 150. Because the facts did not establish a nexus between evidence of illegal drug activity and the defendant's residence, the Court ordered the evidence seized therefrom suppressed. *Id.* at 151.

In Mr. Puga De La Rosa's case, the search warrant affidavit is silent on any nexus between his home and a gun. In refusing to suppress the gun evidence, the trial court relied on *State v. Condon,* 72 Wn. App. 638, 865 P.2d 521 (1993). Condon held that when the object of a search is a weapon used to commit a crime, it is reasonable to infer that the weapon is located at the perpetrator's residence, especially in cases where the perpetrator is unaware that police have connected him or her to the crime. *Id.* at 645.

In its disregard of *Thein* and reliance on *Condon*, the trial court failed to consider Mr. Puga De La Rosa's likely awareness that the police connected him to the shooting. RP 10/21/15 at 7-10. In his search warrant affidavit, Detective Hudson details multiple witnesses saw all or parts of the shooting that occurred in broad daylight on the city streets of Aberdeen. CP 23-37. There was nothing clandestine about the crime. The

error in the trial court's analysis is highlighted by the fact that although the police were searching for a .380 caliber handgun, they recovered only a 9 mm pistol in the home. CP 22, 39.

Viewing the four corners of the affidavit, the warrant plainly runs afoul of the Supreme Court's opinion in *Thein* because it alleges no other factual basis to support a belief that a weapon would be found at Mr. Puga De La Rosa's home other than the mere fact that he lived there. CP 23-37. Because the search warrant affidavit does not set forth sufficient facts to support a reasonable nexus between the place to be searched and the items sought, the trial court erred in refusing to suppress the items seized in the search.

2. If the State substantially prevails on appeal, any request for appellate costs should be denied.

If Mr. Puga De La Rosa does not prevail on appeal, he requests that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the "court of appeals . . . may require an adult . . . to pay appellate costs."). Imposing costs against indigent defendants raises problems well documented in *Blazina*:

"increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). *Sinclair* recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

Although Mr. Puga De La Rosa retained counsel at the trial court, the court found he qualified for indigent defense on appeal. Supp. DCP, Order of Indigency (sub. nom. 38). As noted on the Motion and Order Seeking Review at Public Expense, Mr. Puga De La Rosa had no money, no savings, and no job. Supp DCP, Motion and Order Seeking Review at Public Expense (sub. nom 37). Mr. Puga Dela Rosa may have difficulty finding well-paying work given his criminal history of (now) three felony convictions. CP 114-15.

Importantly, there is a presumption of continued indigency through the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Mr. Puga Dela Rosa's financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393. Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise it discretion by denying the

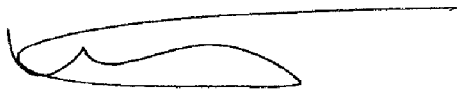
State's request for appellate costs in this appeal involving an indigent appellant.

CONCLUSION

The court should reverse and remand to the trial court in light of the trial court's error in authorizing an improper search of Mr. Puga De La Rosa's residence.

Alternatively, this court should not impose any appellate costs.

Respectfully submitted August 29, 2016.



LISA E. TABBUT/WSBA 21344
Attorney for Rigoberto Puga De La Rosa

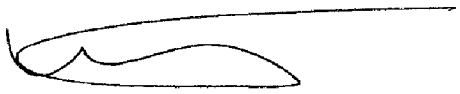
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Grays Harbor County Prosecutor's Office, at appeals@co.grays-harbor.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Rigoberto Puga De La Rosa, P.O. Box 44, Neilton, WA 98566.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed August 29, 2016, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Rigoberto Puga Dela Rosa, Appellant

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